SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 9 1971
ROBERT SEAVER, CLERK

In the Supreme Court of the United States

NO. 71-511

A. JAY CRISTOL, as a resident and taxpayer of the City of Miami Beach, on his own behalf and in behalf of all others similarly situated, A. JAY CRISTOL, individually, and PALM-HIBISCUS-STAR ISLANDS PROPERTY OWNERS ASSOCIATION, a Florida corporation not for profit,

Petitioners,

vs.

THE CITY OF MIAMI BEACH, a municipal corporation, THE HONORABLE JAY DERMER, as Mayor of the City of Miami Beach, THE HONORABLE RUTH B. ROULEAU, as City Clerk of the City of Miami Beach, VIDA, LTD., a limited partnership, and MARSHALL WISE, Director, GERALD K. SCHWARTZ, Member, DAVID TAUB, Member, SHERMAN FAST, Member, ABE SOLOSKO, Member, as constituting the Miami Beach Housing Authority,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

A. J. CRISTOL
Attorney for Petitioners
CRISTOL ROSE & ALDRICH
21 Northeast First Avenue
Miami, Florida 33131

MIAMI REVIEW — 371-4853 — 377-3721

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

Petitioners, A. JAY CRISTOL, et al., pray that a Writ of Certiorari issue out of this Court to review the judgment of the District Court of Appeal of Florida, Third District, entered in the above entitled case.

OPINION BELOW

The opinion of the Court below (A-43) is reported at 246 So.2d 595.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, was entered on April 8, 1971. (A-43) A timely Petition for Rehearing was denied on April 30, 1971. (A-48) A Petition for Certiorari was then filed with the Supreme Court of Florida on May 21, 1971, and was den.ed on June 10, 1971. (A-50) A Motion for Rehearing was filed on June 24, 1971, and was denied on July 12, 1971. (A-51) The jurisdiction of this Court is involved under 28 U.S.C., § 1257 (3).

QUESTIONS PRESENTED

WHETHER THE FAILURE OF THE LOWER COURT TO OPEN OR OTHERWISE CONSIDER THE SEALED ENVELOPE CONTAINING THE DEPOSITIONS OF DEFENDANTS, ABE SOLOSKO AND RUTH B. ROULEAU, ON FILE PRIOR TO THE ENTRY OF SUMMARY JUDGMENT CONSTITUTED A DENIAL OF DUE PROCESS OF LAW?

WHETHER THE DENIAL OF A CONTINUANCE AT A HEARING ON SUMMARY JUDGMENT TO A PARTY WHO, UPON TIMELY AND EFFICACIOUS AFFIDAVIT, HAS ALLEGED THE EXISTENCE OF ADDITIONAL AVAILABLE EVIDENTIARY PROOF ESTABLISHING A MATERIAL FACT IN ISSUE RENDERS SAID HEARING COLORABLE AND ILLUSIVE JUSTICE AND CONSTITUTES A DENIAL OF DUE PROCESS OF LAW?

STATEMENT

On August 4, 1970, Petitioners filed an Amended Complaint seeking to enjoin the City of Miami Beach from conveying certain public lands to a private developer. Petitioners alleged that the transfer involved an unlawful and inadequate consideration.

Subsequent to the filing of the Complaint, Petitioners moved to depose several of the defendants. The Petitioners succeeded in deposing defendants, Abe Solosko and Ruth B. Rouleau. Their depositions were placed in a sealed envelope and were filed with the Circuit Court on November 20, 1970, for use in the forthcoming summary judgment decision.

Four other defendants, all of whom were members of the Housing Authority which supported the conveyance, failed without cause to appear for noticed depositions on October 20, 1970. Petitioners re-noticed and deposed the four absent defendants. However, said depositions could not be transcribed and submitted before the hearing on summary judgment.

Petitioners filed an affidavit (A-18) stating that due to the proximity of the re-noticed depositions and the hearing on summary judgment the depositions could not be transcribed in time for the hearing. Petitioners moved for a continuance to allow the reporter time to transcribe the depositions and submit them to the court. Said continuance was denied by the court.

In addition, while on file prior to the entry of Summary Judgment, the Circuit Court failed to open the sealed envelope containing the depositions of Solosko and Rouleau which had theretofore been filed with the Clerk. The Circuit Court did not consider the depositions alleged by the Petitioners to prove a material fact at issue.

The court entered Summary Judgment against Petitioners on November 24, 1970, without ever having considered the depositions proffered by the Petitioners. Plaintiff's Motion for Rehearing was denied on January 18, 1971, and the seals on the envelopes remained unbroken. (A-27, Index to transcript)

Petitioners appealed to the District Court of Appeal of Florida, Third District. On April 8, 1971, the District Court affirmed the lower court decision. **A. Jay Cristol, et al. v. City of Miami Beach, et al.**, 246 So.2d 595 (3rd D.C.A., Fla. 1971).

After denial of rehearing the Petitioners petitioned the Supreme Court of Florida to grant a Writ of Certiorari to the Third District Court. Petitioners first raised the question of denial of due process in the initial appeal from the Circuit Court to the District Court of Appeal,

Third District, and thereafter in the Petition for Certiorari filed with the Supreme Court of Florida. Petitioners again raised the denial of due process question. (See Third District Court opinion specifically ruling thereon. (A-43)

The Supreme Court of Florida denied Certiorari on June 10, 1971. A timely Petition for Rehearing was filed by Petitioners on June 24, 1971, and was denied on July 12, 1971.

The United States of America was dismissed as a party to the suit (A-23) at its request upon consent of Petitioners. (A-23, Index to transcript)

REASONS FOR GRANTING THE WRIT

The Third District Court of Appeal's decision below affirming the Summary Judgment against Petitioners has deprived the Petitioners of their rights without a full and fair hearing and is in direct violation of the Fourteenth Amendment guarantee of due process of law.

Today is the era of dissatisfaction with government at every level. People are estranged from government. Some have taken to change the present situation by planting bombs and rioting in the streets. Others have attempted to work within the system by use of the courts. Unless the courts are available to the people for a full and fair hearing of grievances against government, the people will have their redress of grievances by other means.

This case is a classic example of the tendency of state courts to accept as right and rubber stamp any municipal action with total disregard to fairness and due process of law to citizens who go to court to question a municipal, county or state action.

In this case the District Court of Appeal entered a three page opinion only six (6) days after oral argument, and the opinion itself is without a single citation of a Florida or federal case.

Because a city was the principal defendant, the case was rushed from amended complaint to summary judgment in 108 days. The appeal was accelerated through the District Court of Appeal, and thereafter a denial of rehearing in the Supreme Court of Florida was entered on July 12, 1971. The total time was less than a year for processing through the trial court and two appellate courts. The Florida courts raced roughshod over the complaining citizens to enter final orders in favor of the city without allowing time for the citizens to prepare their case and refusing to even look at the evidentiary materials of the citizens placed in the court file.

The guarantee of due process of law is embodied in the Fifth and Fourteenth Amendments to the federal constitution. It has two aspects, procedural and substantive. Both are safeguarded by the Fourteenth Amendment against deprivation by the states. **Georgia Power Co. v. Decatur**, 281 U.S. 505, 50 S.Ct. 369, 74 L.Ed. 999 (1930).

As concerns the instant case, Petitioners allege the deprivation of procedural due process. Fundamental to

the concept of procedural due process is the opportunity to be heard. **Goldberg v. Kelly**, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). In **Link v. Wabash R. Co.**, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 737 (1962), it was stated:

> The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights for which the constitutional protection is invoked.

A hearing which conforms with the constitutional mandate of due process of law must be full and fair. **Kwong Hai Chew v. Colding**, 344 U.S. 590, 75 S.Ct. 472, 97 L.Ed. 576 (1952); **Railroad Commission of Calif. v. Pacific Gas & Electric**, 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 314 (1937).

In **Akron C & Y R. Co. v. U.S.**, 261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605 (1922), it was stated:

> A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken.

In Florida, the Supreme Court of Florida has ruled repeatedly that in observing due process of law, the opportunity to be heard must be full and fair, not merely colorable or illusive. **Redman v. Kyhe**, 76 Fla. 79, 80 So. 300 (1919); **Ryan's Furniture Exchange v. McNair**, 120 Fla. 109, 162 So. 483 (1935).

The right under the due process clause to a full and fair hearing includes the right of the party whose rights are sought to be affected to introduce evidence and have judicial findings based thereon. **Baltimore & O. R. Co. v. United States,** 298 U.S. 344, 80 L.Ed. 1209, 56 S.Ct. 797 (1936); 16 Am. Jur. 2d, § 579, page 984.

In the present case the Petitioners have raised two issues of deprivation of due process of law.

The Petitioners first point to the failure of the lower court before entry of Summary Judgment to open the sealed envelope containing the depositions of two defendants and consider the material therein. (A-27, Index to transcript)

Under the concepts of full and fair hearing as espoused within the due process clause, the parties must be granted an ample opportunity to show the propriety or impropriety of the step asked to be taken. **Akron C & Y R. Co., supra.** If the court fails to consider the argument and proffered materials of a party, how can it be said that he has had a fair and ample opportunity? Such actions render hearings an empty formality. Manifestly there can be no hearing where the court refuses to consider the evidence before it.

The second point raised by the Petitioners is the failure of the lower court to grant a continuance so that the Petitioners could transcribe the depositions of four defendants who had previously failed to appear. Such action by the Circuit Court in denying the Petitioners the opportunity to bring forth evidence to establish a material fact in issue constitutes a denial of due process.

The essential aspect of a hearing within the due process clause is fairness. A party has a right to a hearing or an opportunity to be heard before judgment with full opportunity to present all the evidence and argument which the party deems important. 16A, CJS, § 622, page 825. How can this right be reconciled in the instant case with a court which at summary judgment refused to even read the deposition asserted by the Petitioners to prove a material fact at issue. If this procedure is affirmed, due process of law becomes an empty gesture indeed.

CONCLUSION

Accordingly, we respectfully submit that the decision and opinion of the Third District Court of Appeal of Florida through which the Petitioners' Summary Judgment was affirmed be reversed and set aside.

Respectfully submitted,

A. JAY CRISTOL
Attorney for Petitioners

Of Counsel for Petitioners
CRISTOL ROSE & ALDRICH
21 Northeast First Avenue
Miami, Florida 33131